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Chan Tai Ping v Ning Yang Properties Sdn Bhd & Ors

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HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-22NCC-567–11 OF 2020
LIZA CHAN JC
27 JUNE 2022

C

Companies and Corporations — Director — Removal — Defendants removed plaintiff as director — Whether plaintiff's removal as director was done in bad faith — Whether plaintiff entitled to relief claimed

D

Companies and Corporations — Oppression — Oppression of minority — Plaintiff alleged affairs of company had been conducted in manner oppressive to and/or in disregard of his interest as shareholder of company — Whether there was misappropriation of funds by defendants — Whether dividends ought to be paid to plaintiff — Companies Act 2016 s 346

E

The first defendant was a property construction and development company ('the company'). The plaintiff, the second defendant ('Lee Junior') and Lee Junior's father, the third defendant ('Lee Senior') held 10%, 30% and 60% respectively of the company's shares. On 4 March 2020, Lee Senior and Lee Junior gave special notice of their intention to propose an ordinary resolution to remove the plaintiff as a director of the company. The plaintiff lodged police reports against Lee Senior and Lee Junior purportedly for misappropriation of company's funds. A day before the general meeting, the plaintiff's solicitors issued a letter, inter alia, urging that the status quo be maintained pending police investigations, threatening legal proceedings including injunctive relief. Lee Senior and Lee Junior's solicitors replied to the said letter denying the allegations as baseless. On 4 August 2020, Lee Senior and Lee Junior again gave special notice of their intention to propose an ordinary resolution to remove the plaintiff as a director. The plaintiff again wrote to the company's board of directors and the company secretary to, inter alia, protest the passing of a resolution to remove him as a director. On 10 September 2020, the general meeting convened, passed a resolution to remove the plaintiff as director of the company. The plaintiff filed an originating summons pursuant to s 346 of the Companies Act 2016 ('the CA 2016') against the defendants alleging that the affairs of the company had been conducted in a manner oppressive to and/or in disregard of his interest as a shareholder of the company. The plaintiff alleged, inter alia, that: (a) Lee Senior and Lee Junior dishonestly misappropriated funds belonging to the company; (b) his removal as director of the company was done in bad faith; and (c) Lee Senior and Lee Junior refused to pay any

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dividends since the incorporation of the company. The plaintiff also sought the relief against the defendants, inter alia, the payment of the sum of RM270,000 being the loan advanced by the plaintiff to the company.

Held, dismissing the claim with costs:

(1) The plaintiff did not call any of the three contractors to prove the misappropriation. In addition, the invoices from the three contractors were categorised as Part B documents where authenticity was not in dispute. The plaintiff's failure to 'put' his case on misappropriation of funds to Lee Junior, and further omission to put to both the Lees that the invoices by the three contractors were fabricated attracted the application of the principle in *Browne v Dunn* (1893) 6 R 67 — it must be taken that the plaintiff had abandoned his pleaded claim. The purported losses arising from the plaintiff's allegations of misappropriation of company funds which on a balance of probabilities had not been proven, even if true, were suffered by the company and did not form a distinct injury to the plaintiff in his capacity as a shareholder. The facts here did not advance the plaintiff's case one whit; far from it as the unlawful conduct of misappropriation had not been proven on a balance of probabilities. They remained bare allegations (see paras 40–41, 43 & 51–52).

(2) The appointment and removal of directors belonged to the internal management or affairs of the company and the court would not interfere with the internal management of a company. It was the memorandum and articles of association that governed the affairs of the company, including the appointment and removal of directors. Section 206 of the CA 2016 and article 69 of the articles of association of the company allowed shareholders to remove directors without assigning a reason. Lee Senior and Lee Junior as the other shareholders in the company owed no duty to the plaintiff how they exercised their votes. The exercise by the majority shareholders of their power under the articles to vote the plaintiff off the board, did not contravene any prior agreement between them and was not contrary to any equitable principle of good faith (see paras 56–57, 59, 62 & 64).

(3) The plaintiff's assertion that RM50,000 out of a sum of RM320,000 was used to pay for his 10% shares in the company was not borne out by the evidence. The plaintiff had not discharged the burden of proving an agreement between him and Lee Senior to be paid for his alleged involvement in a sale of Lee Senior's land in 2011 and that out of such entitlement, he had loaned a sum of RM270,000 to the company (see paras 66 & 69).

(4) The non-payment of dividends was not discriminatory of or targeted specifically at the plaintiff as Lee Senior and Lee junior as the other shareholders, were also similarly not paid. The plaintiff was not treated

any differently from the other shareholders on the non-payment of dividends. The precise nature of the plaintiff's complaints as borne out by the evidence adduced was unsatisfactory and did not engage the intervention of the court under s 346 of the CA 2016. The plaintiff's claim as he appeared to have commenced his claim of oppression was for the collateral purpose of being able to exit at will. A mere desire to exit the company at will, would not afford a remedy under s 346 of the CA 2016. There was no right to cash out or exit at will (see paras 72 & 75–77).

[Bahasa Malaysia summary

Defendan pertama ialah syarikat pembinaan dan pembangunan hartanah ('syarikat'). Plaintif, defendan kedua ('Lee Junior') dan bapa Lee Junior, defendan ketiga ('Lee Senior') masing-masing memegang 10%, 30% dan 60% saham syarikat. Pada 4 Mac 2020, Lee Senior dan Lee Junior memberikan notis khas mengenai hasrat mereka untuk mencadangkan resolusi biasa untuk memecat plaintif sebagai pengarah syarikat. Plaintif membuat laporan polis terhadap Lee Senior dan Lee Junior kononnya kerana penyelewengan dana syarikat. Sehari sebelum mesyuarat agung, peguam plaintif mengeluarkan surat antara lain, menggesa supaya status quo dikekalkan sementara menunggu siasatan polis, mengancam prosiding undang-undang termasuk relif injunksi. Peguam Lee Senior dan Lee Junior membalas surat tersebut yang menafikan dakwaan itu sebagai tidak berasas. Pada 4 Ogos 2020, Lee Senior dan Lee Junior sekali lagi memberi notis khas mengenai hasrat mereka untuk mencadangkan resolusi biasa untuk memecat plaintif sebagai pengarah. Plaintif sekali lagi menulis kepada lembaga pengarah syarikat dan setiausaha syarikat untuk antara lain membantah kelulusan resolusi untuk memecatnya sebagai pengarah. Pada 10 September 2020, mesyuarat agung bersidang, meluluskan resolusi untuk memecat plaintif sebagai pengarah syarikat. Plaintif memfailkan saman pemula menurut s 346 Akta Syarikat 2016 ('AS 2016') terhadap defendan dengan mendakwa bahawa hal ehwal syarikat telah dijalankan dengan cara yang menindas dan/atau tidak mengambil kira kepentingannya sebagai pemegang saham syarikat itu. Plaintif mendakwa, antara lain, bahawa: (a) Lee Senior dan Lee Junior secara tidak jujur menyalahgunakan dana kepunyaan syarikat; (b) pemecatannya sebagai pengarah syarikat dilakukan dengan niat jahat; dan (c) Lee Senior dan Lee Junior enggan membayar sebarang dividen sejak penubuhan syarikat itu. Plaintif juga memohon relif terhadap defendan, antara lain, pembayaran jumlah RM270,000 merupakan pinjaman yang didahulukan oleh plaintif kepada syarikat.

Diputuskan, menolak tuntutan dengan kos:

(1) Plaintif tidak memanggil mana-mana daripada tiga kontraktor untuk membuktikan penyelewengan itu. Selain itu, invois daripada tiga kontraktor tersebut dikategorikan sebagai dokumen Bahagian B di mana

kesahihannya tidak dipertikaikan. Kegagalan plaintif untuk 'meletakkan' kesnya mengenai penyelewengan dana kepada Lee Junior, dan peninggalan selanjutnya untuk mengemukakan kepada kedua-dua Lee bahawa invois oleh ketiga-tiga kontraktor itu direka-reka telah menarik penggunaan prinsip dalam *Browne v Dunn* (1893) 6 R 67 — ia mesti diambil bahawa plaintif telah meninggalkan tuntutan yang dirayunya. Kerugian yang dikatakan timbul daripada dakwaan plaintif mengenai penyelewengan dana syarikat yang berdasarkan imbangan kebarangkalian tidak dapat dibuktikan, jika benar, telah dialami oleh syarikat dan tidak membentuk kecederaan yang jelas kepada plaintif dalam kapasitinya sebagai pemegang saham. Fakta di sini tidak memajukan kes plaintif sedikit pun; jauh daripadanya kerana kelakuan penyelewengan yang menyalahi undang-undang belum dibuktikan berdasarkan imbangan kebarangkalian. Ia kekal sebagai tuduhan kosong (lihat perenggan 40–41, 43 & 51–52).

(2) Pelantikan dan pemecatan pengarah adalah milik pengurusan dalaman atau hal ehwal syarikat dan mahkamah tidak akan mengganggu pengurusan dalaman sesebuah syarikat. Memorandum dan artikel persatuan yang mengawal hal ehwal syarikat, termasuk pelantikan dan pemecatan pengarah. Seksyen 206 AS 2016 dan artikel 69 artikel persatuan syarikat membenarkan pemegang saham memecat pengarah tanpa memberikan alasan. Lee Senior dan Lee Junior sebagai pemegang saham lain dalam syarikat itu tidak bertanggungjawab dengan plaintif bagaimana mereka menggunakan undi mereka. Penggunaan kuasa pemegang saham majoriti di bawah artikel untuk mengundi plaintif daripada lembaga pengarah, tidak melanggar mana-mana perjanjian terdahulu antara mereka dan tidak bertentangan dengan mana-mana prinsip ekuiti suci hati (lihat perenggan 56–57, 59, 62 & 64).

(3) Penegasan plaintif bahawa RM50,000 daripada jumlah RM320,000 telah digunakan untuk membayar 10% sahamnya dalam syarikat itu tidak dibuktikan oleh keterangan. Plaintif tidak melepaskan beban membuktikan perjanjian antaranya dan Lee Senior untuk dibayar atas dakwaan penglibatannya dalam penjualan tanah Lee Senior pada 2011 dan daripada hak tersebut, dia telah meminjamkan sejumlah RM270,000 kepada syarikat (lihat perenggan 66 & 69).

(4) Kegagalan pembayaran dividen tidak mendiskriminasi atau disasarkan secara khusus kepada plaintif kerana Lee Senior dan Lee Junior sebagai pemegang saham lain, juga tidak dibayar. Plaintif tidak dilayan secara berbeza daripada pemegang saham lain atas kegagalan pembayaran dividen. Sifat tepat aduan plaintif seperti yang dibuktikan oleh keterangan yang dikemukakan adalah tidak memuaskan dan tidak melibatkan campur tangan mahkamah di bawah s 346 AS 2016. Tuntutan plaintif sepertinya kelihatan telah memulakan tuntutan

penindasannya adalah untuk tujuan kolateral untuk dapat keluar sesuka hati. Keinginan semata-mata untuk keluar dari syarikat sesuka hati, tidak akan menjadi remedi di bawah s 346 AS 2016. Tidak ada hak untuk mengeluarkan atau keluar sesuka hati (lihat perenggan 72 & 75–77).]

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770, CA (refd)
Ayoromi Helen v pp [2005] 1 MLJ 699; [2005] 1 CLJ 1, CA (refd)
Bellador Silk Ltd, Re [1965] 1 All ER 667, Ch D (refd)
Browne v Dunn (1893) 6 R 67, HL (refd)
Burland v Earle [1902] AC 83, PC (refd)
Chi Liung & Son Ltd, Re; Tong Chong Fah v Tong Lee Hwa & Ors [1968] 1 MLJ 97 (refd)
Genisys Intergrated Engineers Pte Ltd v UEM Genisys Sdn Bhd & Ors [2008] 6 MLJ 237, CA (refd)
Ho Yew Kong v Sakae Holdings Ltd [2018] 2 SLR 333; [2018] SGCA 33, CA (refd)
Hoy Pak Kwai (suing on behalf of himself and for the benefit of the company Aerial Product Industries Sdn Bhd) v Leong Kon Fah & Ors [2007] 1 MLJ 508; [2007] 1 CLJ 121, CA (refd)
Khor Lye Hock & Anor v Makassar Engineering & Construction Sdn Bhd & Ors [2010] MLJU 18; [2011] 8 CLJ 476, HC (refd)
Koh Jui Hiong @ Koa Jui Heong & Ors v Ki Tak Sang @ Kee Tak Sang and another appeal [2014] 3 MLJ 10, FC (refd)
Kong Thai Sawmill (Miri) Sdn Bhd, Re; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung [1978] 2 MLJ 227, PC (folld)
Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors and another application [1994] 2 MLJ 789, HC (refd)
Lee Yee Wuen v Lee Kai Wuen & Ors [2020] MLJU 1902, CA (refd)
Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd [2017] 4 MLJ 697, FC (refd)
Looh Siong Chee v Numix Engineering Sdn Bhd & Ors and other appeals [2015] 4 MLJ 561, FC (refd)
Low Thiam Hoe & Anor v Sri Serdang Sdn Bhd & Ors [2020] 10 MLJ 137, HC (refd)
Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor [1996] 1 MLJ 113, FC (refd)
O'Neill and another v Phillips and others, Re a company [1999] 2 BCLC 1, HL (folld)
Pan-Pacific Construction Holdings Sdn Bhd v Ngiu-Kee Corp (M) Bhd & Anor [2010] MLJU 269; [2010] 6 CLJ 721, FC (folld)
RA Noble & Sons (Clothing) Ltd, Re [1983] BCLC 273, Ch D (refd)

Rinota Construction Sdn Bhd v Mascon Rinota Sdn Bhd & Ors [2018] 1 MLJ 141, FC (folld)
Saul D Harrison & Sons plc, Re [1995] 1 BCLC 14, CA (refd)
Scottish Co-Operative Wholesale Society Ltd v Meyer and Another [1958] 3 All ER 66; [1959] AC 324, HL (refd)
Senson Auto Supplies Sdn Bhd, Re [1988] 1 MLJ 326 (refd)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395, CA (refd)
Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (Malaysia) Bhd [2004] 2 MLJ 31; [2004] 1 CLJ 532, CA (refd)
Suying Design Pte Ltd v Ng Kian Huan Edmund and other appeals [2020] 2 SLR 221; [2020] SGCA 46, CA (folld)
Tan Ken Meng v HSL Plasctics Sdn Bhd & Ors [2019] MLJU 966, HC (refd)
Tan Kian Hua v Colour Image Scan Sdn Bhd & Others [2004] MLJU 178; [2004] 6 CLJ 174, HC (refd)
Tob Chee Hoong v Tob Chee Choong & Ors [2017] MLJU 1303; [2017] 1 LNS 1256, HC (refd)
Tri-circle Investment Pte Ltd, Re [1993] 2 SLR 523 (refd)
Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals [1996] 1 MLJ 661, CA (refd)
Waddington Ltd v Chan Chun Hoo & Ors [2009] 4 HKC 381 (refd)
Wayde & Another v New South Wales Rugby League Ltd (1985) 10 ACLR 87; (1985) 59 ACLR 798, HC (refd)
Wong Kim Yoon v Cheong Kim Hong & Ors [2019] MLJU 1589, HC (refd)

Legislation referred to

Companies Act 1985 [UK] s 459
Companies Act 1967 [SG] s 216
Companies Act 1965 (repealed by Companies Act 2016) s 181
Companies Act 2016 ss 2, 131(1), (2), 133(1), (2), 206, 346, 347, 348
Evidence Act 1950 s 114(g)

RS Sodhi (with Theng Kai Chi) for the plaintiff.
SM Shanmugam (with Hooi Chung Wai) for the defendants.

Liza Chan JC:

INTRODUCTION

[1] Enclosure 1 was filed on 10 July 2020 as an originating summons by the plaintiff pursuant to s 346 of the Companies Act 2016 ('encl 1') against Ning Yang Properties Sdn Bhd ('the company') and the majority shareholders and directors of the company ie Lee Zhen Ning ('Lee Junior') and Lee Junior's father, Lee Wah Ching ('Lee Senior') alleging that the affairs of the company had been conducted in a manner oppressive to and/or in disregard of his interest as a shareholder of the company. By a consent order dated 6 November

2020, encl 1 is to be continued as if the matter had been begun by writ and the parties filed their respective pleadings.

[2] After a full trial conducted virtually online by using the Zoom video conferencing platform where only the plaintiff, Lee Junior and Lee Senior testified, I had on 28 April 2022 dismissed the plaintiff's claim with costs.

[3] This judgment contains the full reasons for my decision. At the outset, I ought to say that on the facts of the present case, I am in accord with the arguments canvassed by the defendants' counsel and have adopted his submissions in these grounds.

BACKGROUND AND PARTIES

[4] The background facts are culled from the cause papers and submissions of the parties.

[5] The plaintiff at all material times was a senior project manager of Metro Kajang Holdings Bhd and its group of companies from 2005 to 2014 and was an acquaintance of Lee Senior, the third defendant.

[6] The first defendant company was incorporated in 2011 as a property construction and development company with an initial authorised share capital of RM100,000, divided into 100,000 shares of RM1 each. The name of the company, 'Ning Yang' originated from Lee Senior's two sons — Lee Zhen 'Ning' and Lee Zhen 'Yang'.

[7] Lee Senior and the plaintiff became the first directors of the company holding 90% and 10% respectively of the shares from 2011 to 2013. Between 2011 and 2014, the company was dormant.

[8] Lee Junior, the second defendant graduated in 2013 and joined the company as a director on 1 November 2014.

[9] The company's authorised share capital was increased from RM100,000 to RM500,000 on 1 December 2014. Lee Junior subscribed for 30% of the shareholding in the company. The parties thus held the shares in the company from December 2014 as follows:

(a) plaintiff — 10%;

(b) Lee Junior — 30%; and

(c) Lee Senior — 60%.

A **[10]** On 3 April 2014, three landowners ('Raub Landowners') of the land held under Hakmilik GRN 131, Lot 2554, Mukim Teras Daerah Raub, Negeri Pahang ('Lot 2554') and the company entered into a joint venture agreement, in pursuance of which the company will develop Lot 2554 in consideration of 26% of the gross development value to be paid to the Raub Landowners.

B

[11] The plaintiff did a foreseeability study projecting the profitability of the said project to be in the sum of RM10,900,067.

C **[12]** To kickstart the joint venture, only Lee Senior injected capital into the company. Lee Junior assisted in the preparation of the approval of the proposed construction and development of Lot 2554.

[13] The proposed development project was named as Taman Unijaya D which originally was to be in two phases to construct 98 units of double-storey houses. Due to financial difficulties, together with the lack of demand, the Taman Unijaya Project had to be prolonged and amended to be developed in three phases in 2017.

E **[14]** Due to the company's financial difficulties, the company sought and was granted in May 2018 a loan of RM3.7m by Public Islamic Bank Bhd ('the bank'). As part of the security for the loan, Lee Senior charged his own property, a four-storey shop office at Bukit Jalil to the bank and both he and Lee Junior were made guarantors for repayment of the said loan to the bank.

F

[15] On 4 March 2020, Lee Senior and Lee Junior gave special notice of their intention to propose an ordinary resolution to remove the plaintiff as a director of the company. The first defendant's company secretary issued a Notice of General Meeting dated 5 March 2020 for the said purpose.

G

[16] On 5 March 2020, the plaintiff lodged police reports against Lee Senior and Lee Junior purportedly for misappropriation of company's funds.

H **[17]** The meeting to be held on 2 April 2020 was postponed to 17 June 2020 due to the Movement Control Order (MCO).

[18] A day before the general meeting, on 16 June 2020, the plaintiff's solicitors issued a letter, inter alia, urging that the status quo be maintained I pending police investigations, threatening legal proceedings including injunctive relief, and that 'in the event the said EGM is not postponed any resolution passed will be liable to be set aside'.

[19] On 30 June 2020, Lee Senior and Lee Junior's solicitors replied to the

said letter denying the allegations as baseless.

[20] On 4 August 2020, Lee Senior and Lee Junior again gave special notice of their intention to propose an ordinary resolution to remove the plaintiff as a director.

[21] On 9 September 2020, the plaintiff again wrote to the company's board of directors and the company secretary to, inter alia, protest the passing of a resolution to remove him as a director.

[22] On 10 September 2020, the general meeting convened, passed a resolution to remove the plaintiff as director of the company. The company responded to the plaintiff's letter of 9 September 2020.

THE PLAINTIFF'S CASE

[23] The plaintiff sought the following reliefs against the defendants:

(a) an order that Mr Lee Zhen Ning (the second defendant) and Mr Lee Wah Ching (the third defendant) purchase the 10% shares of the plaintiff in Ning Yang Properties Sdn Bhd (the first defendant) for the sum of RM1,090,000 being the 10% shares of the profit on the Taman Unijaya Project or such sums as is ordered by this honourable court;

(b) payment of the sum of RM270,000 being the loan advanced by the plaintiff to the first defendant;

(c) unpaid salaries in the sum of RM170,240 or such other sums as is ordered by this honourable court to be paid by the first defendant to the plaintiff;

(d) alternatively, the first defendant be wound up;

(e) cost;

(f) interest; and

(g) such other relief as is deemed fit and proper by this honourable court.

[24] The plaintiff alleged that the affairs of the company are being conducted by Lee Senior and Lee Junior in a manner oppressive to him and/or in disregard of his interest as a minority shareholder of the company:

(a) Lee Senior and Lee Junior dishonestly misappropriated funds belonging to the company as follows:

(i) dishonestly causing Wisdom Y & Y Sdn Bhd ('Wisdom') to issue progress claims for sewerage work already carried out by Perniagaan Tractor Zan Kwan ('PTZK');

(ii) dishonestly causing William Aluminium Glazing Trading ('William') to issue false claims for the supply and installation of kitchen aluminium doors without any work being carried out;

(iii) dishonestly causing Infra Armada Sdn Bhd ('Infra Armada') to prepare claims for road and drainage works even though Infra Armada did not carry out those works;

(b) pursuant to a letter dated 24 December 2008 (marked during trial as 'ID-P1'), he is entitled to a sum RM320,000 representing 2% of the sale price arising from a sale of Lee Senior's land known as Lot 90396 in 2011, of which RM50,000 was used to pay his 10% shareholding in the company and the balance RM270,000 was converted to a director's 'loan' to the company and remains outstanding to date;

(c) his removal as director of the company was done in bad faith;

(d) he was not paid a monthly salary of RM5,000 for certain periods during his tenure as director of the company, and unpaid salaries of RM170,240 is due and owing to him as follows:

(i) for the period from 2015 to 2016, a sum of RM58,240; and

(ii) for the period from November 2018 to June 2020, a sum of RM112,000.

(e) Lee Senior and Lee Junior refused to pay any dividends since the incorporation of the company.

DEFENDANTS' CONTENTIONS TO THE ALLEGATIONS OF OPPRESSION

[25] The defendants in defending the action asserted that the plaintiff's complaints are untenable and frivolous as the affairs of the company and the powers exercised by the directors in particulars Lee Senior and Lee Junior are not in any manner oppressive to the plaintiff and/or in disregard to his interest as a shareholder:

(a) the allegations on misappropriation of company funds are baseless:

(i) the plaintiff's allegations of misconduct by Lee Senior and Lee Junior in purportedly causing various contractors of the company to issue false claims are (even if true) alleged wrongs done to the company (not to the plaintiff) that can only be remedied by way of a derivative action instead of an oppression action;

(ii) these allegations are concocted to advance the plaintiff's objective to 'cash out';

(iii) the plaintiff failed to put its case to Lee Senior and Lee Junior and

is deemed to have abandoned his case — *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 (CA).

(b) as for the plaintiff's alleged entitlement to the balance RM270,000 as loan to the company:

(i) Lee Senior did not sign the letter dated 24 December 2008 marked as 'ID-P1' nor agreed to pay the plaintiff 2% of the sale of Lot 90396 and had lodged a police report on the matter;

(ii) the contention that the plaintiff's 10% shareholding was purportedly worth RM50,000 and that it was paid out of the RM320,000 was untenable as the initial issued share capital was merely RM100,000 and it was only increased to RM500,000 in year 2014; it was Lee Senior who paid for the 10% shares;

(iii) the plaintiff's alleged entitlement to the balance RM270,000 as loan to the company do not concern the plaintiff's rights as shareholder of the company; simply because the company was *not* even in existence then;

(iv) in addition, there is no such loan nor record in the company of such a loan; and

(v) even if there is such a loan, it is clearly time-barred and/or defeated by reason of laches or acquiescence.

(c) as regards to the plaintiff's removal as director of the company:

(i) since early 2020, the plaintiff had vacated his office in the company;

(ii) due to the strained relationship prior to and following the commencement of these proceedings, Lee Senior and Lee Junior, in the best interest of the company, decided to remove the plaintiff as a director;

(iii) the removal was carried out within the powers of the majority shareholders; and

(iv) the removal as director relates to internal management of the company and does not affect the plaintiff in his capacity as a shareholder of the company.

(d) as for the plaintiff's allegations of unpaid salaries as a director of the company:

(i) there is no agreement and/or employment contract between the company and the appointed directors nor is there any agreement that the directors will be paid a fixed salary;

(ii) when the company is financially well, directors will be allowed to

draw a monthly allowance that is akin to salary. Apart from that, directors will also be able to claim for reasonable expenses incurred ie travelling claims, accommodations, entertainment expenses, phone bills, disbursements etc;

(iii) both Lee Senior and Lee Junior were similarly not paid for the period as pleaded by the plaintiff; and

(iv) the allegation of non payment of salary or allowance are matters related to the internal management of the company, has nothing to do with the plaintiff's rights in the capacity as a shareholder and outside the ambit of a claim made under s 346.

(e) as for non payment of dividends to the plaintiff:

(i) no dividend was paid to the other shareholders as well; and

(ii) it is the common understanding amongst the directors that the company's priority will be to fund the Taman Unijaya Project as well as to pay off the bank loan of RM3.7m.

THE LAW

[26] Section 181 of the Companies Act 1965 ('the CA 1965') is the predecessor of s 346 of the CA 2016. This will become relevant when considering the cases decided under s 181 of the CA 1965 such as *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung* [1978] 2 MLJ 227; *Pan-Pacific Construction Holdings Sdn Bhd v Ngiu-Kee Corp (M) Bhd & Anor* [2010] MLJU 269; [2010] 6 CLJ 721.

[27] Section 346 of the CA 2016 is produced for ease of reference and for its scope. It reads:

346 Remedy in cases of an oppression.

(1) Any member or debenture holder of a company may apply to the Court for an order under this section on the ground —

(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or debenture holders including himself or in disregard of his or their interests as members, shareholders or debenture holders of the company; or

(b) that some act of the company has been done or is threatened or that some resolution of the members, debenture holders or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or debenture holders, including himself.

(2) If on such application the Court is of the opinion that either of those grounds is established, the Court may make such order as the Court thinks fit with the view to bringing to an end or remedying the matters complained of, and without prejudice to the generality of subsection (1), the order may —

(a) direct or prohibit any act or cancel or vary any transaction or resolution;

(b) regulate the conduct of the affairs of the company in the future;

(c) provide for the purchase of the shares or debentures of the company by other members or debenture holders of the company or by the company itself;

(d) in the case of a purchase of shares by the company, provide for a reduction accordingly of capital of the company; or

(e) provide that the company be wound up.

(3) ...

(4) ...

(5) ...

(6) ...

[28] *Re Kong Thai Sawmill* is the leading authority on s 181 where the Privy Council explained the approach to be taken (at p 229):

... for the case to be brought within s 181(1)(a) at all, *the complaint must identify and prove 'oppression' or 'disregard'. The mere fact that one or more, of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions, with which the complainant does not agree, is not enough. Those who take interests in companies limited by shares have to accept majority rule. It is only when majority rule passes over into rule oppressive of the minority, or in disregard of their interests, that the section can be invoked.* As was said in a decision upon the United Kingdom section *there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of oppression can be made* (*Elder v Elder & Watson Ltd*): Their Lordships would place the emphasis on 'visible'. And similarly 'disregard' involves something more than a failure to take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure (per Lord Clyde in *Thompson v Drysdale*). Neither 'oppression' nor 'disregard' need be shown by use of the majority's voting power to vote down the minority: either may be demonstrated by a course of conduct which in some identifiable respect, or at an identifiable point in time, can be held to have crossed the line.

... in a number of United Kingdom decisions it has been held that for s 210 to apply *the complainant must show oppression continuing up to the date of proceedings* (eg, *In Re Jermyn Street Turkish Baths Ltd*); where there has been oppression in the past the

section does not bite. Their Lordships agree that the wording of the section (and the same is true of s 181(1)(a)) relates to a present state of affairs: 'are being conducted', powers 'are being exercised' are grammatically clear: the language may be contrasted with that of s 181(1)(b) which refers to an act of the company which has been done or threatened. But this argument must not be taken too far. What is attacked by sub-s (1)(a)) is not particular acts but the manner in which the affairs of the company are being conducted or the powers of the directors exercised. And these may be held to be 'oppressive' or 'in disregard' even though a particular objectionable act may have been remedied. A last minute correction by the majority may well leave open a finding that as shown by its conduct over a period, a firm tendency or propensity still exists at the time of the proceedings to oppress the minority or to disregard its interests so calling for a remedy under the section. This point is well brought out in *Re Bright Pine Mills Pty Ltd*. (Emphasis added.)

[29] Clear guidance can also be found in the Federal Court decision of *Pan-Pacific Construction Holdings Sdn Bhd v Ngiu-Kee Corp (M) Bhd & Anor* which set out some important principles in order to succeed in an oppression petition pursuant to then s 181 of the CA 1965. I produce them in extenso:

[22] But in order to better appreciate the core issue it may be appropriate to first examine the principles of law on the application of s 181 in relation to a company which is not in the nature of quasi-partnership. Meanwhile, it is trite law that in order to succeed in its petition the burden is upon a petitioner on the balance of probability to establish all the elements required to be proven under s 181.

[23] This court in *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113 briefly reviewed the genesis of judicial intervention in the internal affairs of incorporated companies. It said that 'Traditionally, courts have been reluctant to interfere with matters relating to the internal management of incorporated companies ... Two landmark decisions settled the law upon the subject for all time. The first of these was *Foss v Harbottle* (1843) 67 ER 190 the second was *Mozley v Alston* (1847) 41 ER 833 ... In time it was accepted that what has come to be known as the rule in *Foss v Harbottle*.

[24] The judgment went on to say that the effect of such legislative provisions as s 210 of English Companies Act 1948 (later s 459 of the UK Companies Act 1985 and presently s 994 UK Companies Act 2006) which is similar but not in pari materia with s 181 of the Act which is wider in scope, 'was not to abrogate but to introduce limited exceptions to the rule in *Foss v Harbottle*'. Thus, it is fair to say that oppression for instance in company law is not a free-floating common law concept but a legislative creature.

[25] Therefore, in order to succeed in its Petition pursuant to section 181 the Petitioner has to establish and 'must eminently be determined according to the facts' of this case that the affairs of the company are being conducted or that the powers of the directors are being exercised in an oppressive manner or in disregard of its interests, or to its prejudice some unfairly discriminatory or prejudicial act of the company has been done or threatened, or that some resolutions of the members, debenture holders or any class of them has been passed or is proposed to be passed.

[26] In other words *s 181 permits judicial remedy on four categories of conduct, namely, oppressive conduct, conduct in disregard of interests, unfairly discriminatory conduct or prejudicial conduct.*

[27] It may also be noted that from the wordings of s 181 its basic theme is 'unfairness'. However, unfairness 'does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles. 'The court ... has a very wide discretion, but it does no sit under a palm tree'. (See: *O'Neil v Philips* [1999] 2 All ER 961).

[28] In *Re Saul D Harrison & Sons plc* [1995] 1 BCLC it was explained (Hoffmann LJ (as he then was)) that in 'deciding what is fair or unfair for the purposes of s 459, it is important to have in mind that *fairness is being used in the context of a commercial relationship*. The articles of association are just what their name implies: the contractual terms which govern the relationships of the shareholders with the company and each other. They determine the powers of the board and the company in general meeting and everyone who becomes a member of a company is taken to have agreed to them. Since keeping promises and honouring agreements is probably the most important element of commercial fairness, the starting point in any case under s 459 will be to ask whether the conduct of which the shareholder complains was in accordance with the articles of association ... The answer to this question often turns on the fact that the powers which the shareholders have entrusted to the board are fiduciary powers, which must be exercised for the benefit of the company as a whole ... But the fact that the board are protected by the principle of majority rule does not necessarily prevent their conduct from being unfair within the meaning of s 459.

[29] Thus, in *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung* [1978] 2 MLJ 227 the term 'disregard of interests' is to be understood to mean 'unfair disregard' while 'oppression' denotes an 'unfairly prejudicial conduct' which means a conduct 'departing from standards of fair dealing and a violation of conditions of fair play'. But 'a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted'. And 'trivial or technical infringements of the articles were not intended to give rise to petitions under s 459' (see: *Re Saul D Harrison & Sons Plc*).

[30] The principles of law are therefore quite settled in a non-quasi-partnership company. However, where it is (in the nature of quasi-partnership) as in this case there is an added factor which members are obliged in law to observe, namely, to act in good faith to one another.

[30] The meaning of 'oppression' is beyond universal definition — *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors and another application* [1994] 2 MLJ 789 at p 789. Viscount Simmonds in the House of Lords in *Scottish Co-Operative Wholesale Society Ltd v Meyer and Another* [1958] 3 All ER 66; [1959] AC 324 at p 342 accepted that according to the dictionary, 'oppression' means 'burdensome, harsh and wrongful'.

[31] Whether there was oppression or disregard or unfair discrimination or whether the conduct complained of was 'otherwise prejudicial' is one that must eminently be determined according to the facts of each particular case — *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113 (FC). This principle was reiterated by the Federal Court 14 years later in *Pan-Pacific Construction Holdings Sdn Bhd v Ngiu-Kee Corp (M) Bhd & Anor* which also discussed the scope of s 181 at [25] .

[32] The same Federal Court explained what 'unfairness' meant in the context of s 181 at [27].

[33] Whether the affairs of the company are being conducted in a manner oppressive to some part of the members including the plaintiff, is a question of fact for the court to decide, to be answered not by a consideration of events in isolation, but *'to events considered as part of a consecutive story'* — *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors and another application* [1994] 2 MLJ 789; *Genisys Intergrated Engineers Pte Ltd v UEM Genisys Sdn Bhd & Ors* [2008] 6 MLJ 237 (CA).

[34] The latest position is that of the Federal Court in *Looh Siong Chee v Numix Engineering Sdn Bhd & Ors and other appeals* [2015] 4 MLJ 561 where the Federal Court was invited to reconsider the test under s 181 of the Companies Act 1965 in the light of the decisions in *O'Neill and another v Phillips and others, Re a company* [1999] 2 BCLC 1 and *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14. The Federal Court declined to reconsider the test and stated in paras 33–35 as follows:

> [33] For the above reasons, we have no choice, but to answer the question posed in the negative. There is no valid reason, either in law or on the facts, for this court to reconsider the test under s 181 of the Companies Act. To recapitulate: In *Pan-Pacific Construction*, this court had specifically accepted the proposition by Lord Hoffman in *O'Neill and Another v Phillips and Others* and *Re Saul D Harrison & Sons Plc* that the concept of fairness should be applied judicially and that fairness would mean 'commercial fairness'. This was endorsed by the later case *Jet-Tech Materials*.
>
> [34] From the above decisions of this court, it is now trite law that the applicable test under s 181 is the principle as laid down in *Re Kong Thai Sawmill* and that the basis to determine fairness was that of 'commercial fairness' as explained in *O'Neill and Another v Phillips and Others* and *Re Saul D Harrison*. This court has been consistent on this matter and there is no incompatibility between the tests in *Re Kong Thai Sawmill* and the English cases cited in the leave question.
>
> [35] In view of the above, we find that there is no question on the need to 'reconsider' the *Re Kong Thai Sawmill* test in the light of the decisions in *O'Neill and Another v. Phillips and Others* and *Re Saul D Harrison* because both have already been adequately considered by this court earlier, as explained above.

[35] The burden of proof is on the plaintiff: see (a) *Re Kong Thai Sawmill (Miri) Sdn Bhd v Ling Beng Sung* at p 229; and (b) *Pan-Pacific Construction Holdings Sdn Bhd v Ngiu-Kee Corp (M) Bhd & Anor* [25]. A

[36] Whether unfair conduct falls within s 346 is an objective test. In *Jaya Medical Consultants Sdn Bhd v Island & Peninsular Bhd & Ors*, Siti Norma J (later CJM) adopted an objective test for unfairness referring at p 536 E-H to Brennan J's judgement in the Australian case of *Wayde & Another v New South Wales Rugby League Ltd* (1985) 10 ACLR 87; (1985) 59 ACLR 798. In *Re RA Noble & Sons (Clothing) Ltd* [1983] BCLC 273, Norse J adopted the test laid down by Glade J in *Re Bovey Hotel Ventures Ltd* and said at p 291: B C

> The test of unfairness must, I think, be an objective, not a subjective, one. In other words it is not necessary for the petitioner to show that the persons who have had de facto control of the company have acted as they did in the conscious knowledge that this was unfair to the petitioner or that they were acting in bad faith; the test, I think, is whether a reasonable bystander observing the consequences of their conduct, would regard it as having unfairly prejudiced the petitioner's interests. D

[37] Here, bearing in mind the above principles, considering the entire story as a whole from the evidence adduced both oral and documentary and the pleadings before the court, the question is, was it made out that the affairs of the company were conducted in a manner oppressive to the plaintiff and/or in disregard of his interest as a minority shareholder of the company? E

[38] This is a convenient point for this court to consider whether the specific complaints fall under the four categories of conduct or act that are oppressive, disregard of interest, unfairly discriminatory or prejudicial conduct. F

Misappropriation of funds belonging to the company by Lee Senior and Lee Junior

G

[39] Central to this complaint, is the question whether in fact there was any misappropriation of company funds, and if so, whether it is oppressive to the plaintiff in his capacity as a member and shareholder of the company and/or in disregard of his interest as a member and shareholder of the company.

H

[40] As alluded earlier, this accusation was denied by both Lee Senior and Lee Junior. It behoves the plaintiff to prove this complaint. Until the burden of proof is discharged by the plaintiff, there is no burden nor obligation or duty on the defendants to cross examine the plaintiff. In this regard, it is trite law that the plaintiff, had both the 'burden of proof' to make out a prima facie case as well as the initial onus of proof to adduce evidence to prove his claim. The onus of proof would only shift to the defendants if the plaintiff had made out a prima facie case. See for eg the Federal Court decision in *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena* I

Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd [2017] 4 MLJ 697.

[41] In support of this complaint, the plaintiff made police reports and claimed he spoke to the three contractors or suppliers, Wisdom, William and Infra Armada and there were 'admission' by the three contractors of misappropriation of funds under the alleged instructions of Lee Senior and Lee Junior. However the plaintiff did not call any of these contractors or suppliers to prove the misappropriation. I accept the defendants' submission that it may be presumed pursuant to s 114(g) of the Evidence Act 1950 that if they were called, their evidence would be unfavourable to the plaintiff's case.

[42] In addition, the invoices from Wisdom, William and Infra Armada are categorised as Part B documents where authenticity is not in dispute. The notes of proceedings ('NOP') at pp 118–119 show the plaintiff understood the effect of classifying a document in Part B.

[43] Lee Junior and Lee Senior (who adopted Lee Junior's evidence) in examination in chief gave detailed explanations on the transactions with Wisdom, William and Infra Armada but were not challenged in cross-examination by the plaintiff . Thus , their evidence ought to be accepted — see *Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (Malaysia) Bhd* [2004] 2 MLJ 31; [2004] 1 CLJ 532 and *Ayoromi Helen v Public Prosecutor* [2005] 1 MLJ 699; [2005] 1 CLJ 1, where in the later case, the Court of Appeal held that:

> Failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony.

[44] There is no escaping that the sum total of the cross-examination of Lee Junior at NOP pp 201–207 show Lee Junior was merely asked if he is aware of payments to the three contractors whilst Lee Senior was merely at NOP pp 301–303 asked pointedly one question whether there was misappropriation of funds to which he disagreed. The plaintiff's failure to 'put' his case on misappropriation of funds to Lee Junior, and further omission to put to both the Lees that the part B invoices by the three contractors were fabricated attract the application of the principle in *Browne v Dunn* (1893) 6 R 67 and accepted by the Court of Appeal in *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 and in *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 — it must be taken that the plaintiff has abandoned his pleaded claim. The Court of Appeal in *Aik Ming* applied the principle in *Browne v Dunn* and said:

> Now, all this is contrary to two fundamental rules of procedural fairness that operate in the environment of private law. The first of these rules relate to the pleaded case while the second has to do with the cross-examination of witnesses. ... The content

> of the second rule may be stated thus. It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. It is quite wrong to think that this rule is confined to the trial of criminal causes. It applies with equal force in the trial of civil causes as well.

[45] In this case, the defendants' counsel Mr SM Shanmugam further postulated that the alleged misconduct by Lee Senior and Lee Junior in purportedly causing various contractors of the company to issue false claims (even if true) are alleged wrongs done to the company (not to the plaintiff qua member) and can only be remedied by way of a derivative action instead of an oppression action.

[46] This postulation to me, is of crucial importance as the CA 2016 provides a separate and distinct remedy for corporate wrongs by way of a statutory derivative action, found in ss 347 and 348 of the Act where the proper party to sue is the company and when the company is unwilling to bring an action, any member of the company can bring such an action on behalf of the company by way of derivative action by first invoking the leave of court as a safeguard against frivolous claims. Where the wrong is done to the member, such member can bring an action in his own right personally.

[47] To illustrate the point, Lord Millet sitting in the Court of Final Appeal in Hong Kong in *Waddington Ltd v Chan Chun Hoo & Ors* [2009] 4 HKC 381, explained at [77]:

> But while there is some overlap between such proceedings and the derivative action they serve essentially different functions. Unfair prejudice proceedings are concerned to bring mismanagement to an end; derivative actions are concerned to provide a remedy for misconduct: see *Re Charnley Davies Ltd (No 2)* [1990] BCLC 760; *Re Chime Corp Ltd* (2004) 7 HKCFAR 546. While the court may have jurisdiction in the strict sense on a petition under s 168A to order payment of compensation to the company, the derivative action is the proper vehicle for obtaining such relief where the plaintiff's complaint is of misconduct rather than mismanagement: see *Re Chime Corp Ltd* (2004) 7 HKCFAR 546 at 571.

[48] Directors' breach of their fiduciary and statutory duties is a misconduct and a wrong done against the company and not the shareholders. The distinction between 'mismanagement' and 'misconduct' and the relief that avail as such whether for an oppression action under s 346 or a derivative action under s 347 of the CA 2016 as the case may be was explained in Federal Court in *Koh Jui Hiong @ Koa Jui Heong & Ors v Ki Tak Sang @ Kee Tak Sang and another appeal* [2014] 3 MLJ 10 where Jeffrey Tan FCJ stated:

> [25] ... In my judgment the distinction between misconduct and ...

(mismanagement) does not lie in the particular acts or omissions of which the complaint is made, but in the nature of the complaint and the nature of the remedy necessary to meet it ... If the whole gist of the complaint lies in the unlawfulness of the acts or omissions complained of, so that it may be adequately redressed by the remedy provided by law for the wrong, the conduct is one of misconduct simpliciter (*Re Charnley Davis Ltd (No 2)* [1990] BCLC 760, per Millett J) ... Damages were awarded to CH for misconduct towards it, which was actionable by CH itself, by a derivative action (see *Re Charnley Davis Ltd (No 2)* [1990] BCLC 760, where Millett J, as he then was, concluded that where the essence of the claim was not mismanagement but consisted of breaches of duty or other misconduct actionable by the company itself, the proper vehicle for relief was a derivative action; and *AR Evans Capital Partners Limited v Gen2 Partners Inc* [2012] HKCU 1284, where Barma J held that where the claims concern misconduct, they belong to a derivative action).

[56] There is a limit to the extent to which s 181 could be used to outflank the rule in *Foss v Harbottle*. The order to be made must be made with a view to bringing an end or remedying the matters complained of under s 181. The derivative action elements should be an incident of the matters complained of under s 181. *It would be an abuse of s 181 where the nature of the complaint was misconduct rather than mismanagement (see Re Chime Corporation per Lord Scott). 'To a llow corporate claims to be pursued via the oppression remedy would effectively denude the statutory derivative action of much of its intended effect'* (*A Reconsideration of the Shareholder's Remedy for Oppression in Singapore* by Pearlie MC Koh, CLWR 42 1(61) 1 March 2013) ... (Emphasis added.)

[49] In *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333; [2018] SGCA 33, the Singapore Court of Appeal in drawing a distinction between a real injury that the plaintiff had suffered, as opposed to an injury to the company and where the acts complained off overlap and feature both personal wrongs against the shareholder and corporate wrongs against the company, enunciated the following principles:

(a) where an act of oppression features both personal wrongs against the shareholder and corporate wrongs against the company, the court needs to consider the real injury that is complained of and the essential remedy that is sought in ascertaining whether a minority oppression claim brought is an abuse of process;

(b) director's breach of his duty of care, skill and diligence in monitoring the management of his company's affairs would amount to oppression only if the negligent mismanagement is sufficiently serious; and

(c) a shareholder who complains of oppression may be precluded from seeking relief under s 346 where it has an alternative remedy that is both appropriate and adequate to bring to an end the matters complained of.

[50] Paragraph 113 of the Singapore Court of Appeal decision in *Suying*

Design Pte Ltd v Ng Kian Huan Edmund and other appeals [2020] 2 SLR 221; [2020] SGCA 46 is instructive in this context:

> 113. In our judgment, these baseline expectations do not provide a sufficient basis on which to find that Mr Ng has suffered a distinct personal injury which would amount to commercial unfairness. *To find otherwise would, in our view, suggest that any misappropriation of moneys by a director would constitute a distinct injury to a shareholder. This would be too broad a construction of the framework the Court of Appeal set out in Sakae Holdings and make impermissible inroads into the proper p lain tiff's rule. Th is simply can not be the case. Further, the breach of this expectation would be remedied by the recovery of the misappropriated moneys by the company in a corporate action. The Company Act provides s 216A for this purpose.* (Emphasis added.)

[51] The Federal Court in the case of *Rinota Construction Sdn Bhd v Mascon Rinota Sdn Bhd & Ors* [2018] 1 MLJ 141 discussed the elements which differentiate between an oppression action and a derivative claim and pronounced:

> [33] We shall now deal with the derivative action point. The derivative action and the minority oppression petition are not mutually exclusive and there may be circumstances which give rise to both a derivative claim and an oppression proceeding, but they remain distinct remedies with separate rationales and statutory functions (see the case of *Koh Jui Hiong @ Koa Jui Heong & Ors v Ki Tak Sang @ Kee Tak Sang and another appeal* [2014] 3 MLJ 10; [2014] 2 CLJ 401). (Emphasis added)

[52] Applying the principles elucidated in the authorities above, the purported losses arising from the plaintiff's allegations of misappropriation of company funds which I find on a balance of probability has not been proven, (even if true), are suffered by the company and do not form a distinct injury to the plaintiff in his capacity as a shareholder. He agreed to this under cross-examination:

> Cross-Examination of plaintiff (NOP p 115)
>
> SSM: Yes, ok. Now when you say the company's funds were misappropriated by Lee Senior and Zhen Ning, do you agree that if at all such an allegation is true, the losses are suffered by the company.
>
> CHAN: Yes

[53] The plaintiff cited *Lee Yee Wuen v Lee Kai Wuen & Ors* [2020] MLJU 1902 to support his submission that 'misappropriation of monies can constitute an act of oppression'. Lee Yee Wuen is entitled to greatest respect, it in fact discussed extensively the *Rinota* case but in my respectful view, on the facts here, does not advance the plaintiff's case one whit; far from it as the unlawful conduct of misappropriation in the present proceedings as earlier alluded to, has not been proven on a balance of probabilities. They remain bare

allegations. This head of complaint falls.

[54] Learned counsel for the defendants then argued that the fall of this complaint has a crucial bearing and spells the demise of the whole claim. This argument is not unattractive. Learned counsel pointed out crisply that the plaintiff's 'only reason' for filing the Minority Oppression Claim is that Lee Senior and Lee Junior had purportedly 'misappropriated funds belonging to Ning Yang Company'. This has been:

(a) *pleaded* in the plaintiff's statement of claim:

> *GROUNDS* FOR FILING THIS ACTION
>
> 32. *The plaintiff has filed this action and is praying for the various remedies and orders on the grounds that* the affairs of the first defendant are being conducted and the powers of the directors in particular the second and third defendants are being exercised in a manner oppressive to the plaintiff in his capacity as a member and shareholder of the first defendant company and/or in disregard of his interest as a member and shareholder of the first defendant company *in that the second and/or third defendants who are in control of the affairs of the first defendant company have misappropriated funds belonging to the first defendant*. (Counsel's Emphasis).

(b) *repeated* in the plaintiff's witness statement:

> Q35: What are *your ground* for filing this action?
>
> A35: *I have filed this action and I am praying for the various remedies and orders on the grounds that* the affairs of the first defendant are being conducted and the powers of the directors in particular the second and third defendants are being exercised in a manner oppressive to me in my capacity as a member and shareholder of the first defendant company and/or in disregard of my interest as a member and shareholder of the first defendant company *in that the second and/or third defendants who are in control of the affairs of the first defendant company have misappropriated funds belonging to the first defendant*. (Counsel's Emphasis.)

(c) *confirmed by the plaintiff during cross-examination:*

> Cross-Examination of the plaintiff (NOP pp 74–75 & 156)
>
> > SSM: Yes, I'm referring to your own statement of claim. Now you said that 'grounds for filing this action is that the plaintiff has filed this action and is praying for the various remedies and orders on the grounds that the affairs of the first defendant are being conducted and the powers of directors, in particular second and third defendant, are being exercised in a manner oppressive to the plaintiff in his capacity as a member and shareholder of the first defendant company and in disregard to his interest as a member and shareholder of the first defendant company in that the second and third defendants, who are in control of the affairs of the first defendant company, have misappropriated funds belonging to the first

> defendant'. *Now this is your only reason why you filed this action, correct?*
>
> CHAN: *Yes.*
>
> ...
>
> SSM: Yes? In conclusion, my final part, Mr Chan, yesterday you confirmed that your claim in the Court today is a minority shareholder suit because you say you had been oppressed by the majority shareholder *due to misappropriation of funds by the second and third defendants in connection with the three contractors, and I showed to you paragraph 32 of your statement of claim. You 'll be able to confirm that again?*
>
> CHAN: *Yes, I confirm.*

[55] I agree with counsel's position that the plaintiff must be taken to have abandoned all his other allegations or none of his other allegations have anything to do with the claim of oppression. I will nevertheless, deal with the other complaints for the sake of completeness.

Removal as director

[56] I find this complaint bereft of merits. Firstly, it must be borne in mind that this is not the type of case where the plaintiff has entered into association with the defendants upon the understanding that he participates in the management of the company in which event, equitable considerations can make it unfair for those conducting the affairs of a company to rely on their strict legal powers or rights under the articles of association. Neither is it the plaintiff's complaint that he has a legitimate right to participate in the management of the company based on an understanding as in cases such as *Tan Kian Hua v Colour Image Scan Sdn Bhd & Others* [2004] MLJU 178; [2004] 6 CLJ 174; *Wong Kim Yoon v Cheong Kim Hong & Ors* [2019] MLJU 1589 and *Tob Chee Hoong v Tob Chee Choong & Ors* [2017] 1 LNS 1256; [2017] MLJU 1303.

[57] Second, it is trite law that the appointment and removal of directors belong to the internal management or affairs of the company and the court will not interfere with the internal management of a company:

(a) in *Burland v Earle* [1902] AC 83 at p 93, Lord Davey, when delivering the advice of the Privy Council expressed the proposition in the following words:

> It is an elementary principle of the law relating to joint stock companies that the court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so.

(b) in *Owen Sim*, the Federal Court stated:

> Traditionally, courts have been reluctant to interfere with matters relating to the internal management of incorporated companies. Through a series of decisions of the Court of Chancery in the mid-nineteenth century, they administered unto themselves a jurisdictional prohibition from entering upon domestic disputes between corporators. Two landmark decisions settled the law upon the subject for all time. The first of these was *Foss v Harbottle* (1843) 67 ER 190 the second was *Mozley v Alston* (1847) 41 ER 833.

This principle in *Owen Sim* was echoed by the same court in the *Pan-Pacific* case at [23].

[58] Thirdly, it is the memorandum and articles of association that govern the affairs of the company, including the appointment and removal of directors. In *Re Kong Thai Sawmill*, it was said by the Privy Council that 'Those who take interests in companies limited by shares have to accept majority rule'.

[59] In *Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals* [1996] 1 MLJ 661, Mahadev Shanker JCA held at p 692, that:

> ... if they regarded these matters as important, we think it was imperative not only that agreements on such matters should have been put into writing but also the articles of association should have been amended so as to substantiate the claim that is being made.

[60] Fourthly, s 206 of the CA 2016 and article 69 of the articles of association of the company allow shareholders to remove directors without assigning a reason. The plaintiff in fact threw in the towel when he agreed during cross-examination that the resolution voting him off the Board remains valid (NOP pp 103–104) and added to that, accepted he can be removed pursuant the articles of association:

> Cross-Examination of plaintiff (NOP p 105)
>
> SSM: But you would agree with me that Lee Senior and Zhen Ning, as the majority shareholders of Ning Yang *can and are entitled to remove you as a director of the company according to the company's articles of association?*
>
> CHAN: *Yes.*

[61] Section 2 of the CA 2016 defines the word 'member' as:

> (a) in the case of a company limited by shares, a person whose name is entered in the register of members as the holder for the time being of one or more shares in the company; or
>
> (b) in the case of a company limited by guarantee, a person whose name is entered in the register of members;

[62] That oppression under the scope of s 346 must affect the complainant 'qua member' and not 'director' is made clear by the authorities, inter alia, by:

(a) the Court of Appeal decision in *Hoy Pak Kwai (suing on behalf of himself and for the benefit of the company Aerial Product Industries Sdn Bhd) v Leong Kon Fah & Ors* [2007] 1 MLJ 508; [2007] 1 CLJ 121 which commends itself to me:

> [66] As to the appellant's claim of there being a breach of fiduciary duty, I find this absurd. As correctly pointed out by the trial judge, *the first and second respondents are substantial shareholders and are directors of API. They owe no fiduciary duty to the appellant in exercising their vote at board meetings and as shareholders they owe no duty to anybody as to how they exercise their vote* (*Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals* [1996] 1 MLJ 661). *And the 'mere use of voting power at board meetings or at a general meeting to secure the passing of resolutions which other members of the board or shareholders oppose, would not in general constitute oppression for the purpose of the section or for any other purpose.* For a petition to succeed, *it must be shown that there has been oppression in a real sense of members qua shareholders, and not merely a subordination of their wishes to the power of the voting majority* (*Re Harmer Ltd* [1959] 1 WLR 62 at p 87 per Romer LJ' accepted in *Dato Toh Kian Chuan v Swee Construction & Transport Company (Malaya) Sdn Bhd* [1996] 1 MLJ 730. (Emphasis added.)

(b) *Khor Lye Hock & Anor v Makassar Engineering & Construction Sdn Bhd & Ors* [2010] MLJU 18; [2011] 8 CLJ 476:

> [10] It is a principle of the law relating to the grant of relief under s 181 that mismanagement in itself is not actionable. Disputes relating to policy or management do not entitle a member to relief under the section. More significantly the oppression in question must affect the petitioning member qua member. The acts complained of must affect the member in his capacity as a member, (see *Re Chi Liung & Son Ltd* [1968] 1 MLJ 97 and *Re Tong Eng Sdn Bhd* [1994] 1 MLJ 451 at p 457 per Selventhiranathan J. Prayer (a) This prayer relates to the removal of P1 as a Managing Director. It seeks to cancel the resolution dated 15 May 2009 that removed P1 as Managing Director. The complaint here and relief sought relates to P1's contractual position as Managing Director. It does not relate to his rights as a member. The Board of Directors, moreover is empowered under Article 91 of Table A to remove PL It is significant that he has not been removed as a director nor has any attempt been made to adversely affect his shareholding. *In the matter of Tahansan Sdn Bhd* [1984] 1 MLJ 204,211 Chan J. quoted Plowman J in *In re Lundie Brothers Ltd* [1965] 1 WLR 105:
>
> > ... In my judgment he has wholly failed to do that His main grievance is, as he admitted in the witness box, that he has been ousted as a working director. That, it seems to me, has nothing to do with his status as a shareholder in the company at all. The same thing is equally true in regard to his complaint that his remuneration as a director of the company has been reduced. That relates to his status as a director of the company, and

not to his status as a shareholder of the company.

Chan J then went on to hold:

> The fact that the petitioner in the present case was ousted as a director and that he was deprived of his directors' remuneration relates only to his status as a director, and not to his status as a shareholder. The court, therefore is not given jurisdiction in a situation like this to make an order under s 181.

See also *Low Thiam Hoe & Anor v Sri Serdang Sdn Bhd & Ors* [2020] 10 MLJ 137, *Koh Jui Hiong @ Koa Jui Heong & Ors v Ki Tak Sang @ Kee Tak Sang and another appeal* [2014] 3 MLJ 10 at para [24] and *Tan Ken Meng v HSL Plasctics Sdn Bhd & Ors* [2019] MLJU 966.

[63] Fifthly, save for what is set out in the articles of association, Lee Senior and Lee Junior as the other shareholders in the company owe no duty to the plaintiff how they exercise their votes — *Tuan Haji Ishak bin Ismail*.

[64] In *Pan-Pacific Construction Holdings Sdn Bhd v Ngiu-Kee Corp (M) Bhd & Anor*, the Federal Court stated:

> [34] ... A share is a property which its holder as of right is entitled to utilize it in any manner he may wish. (*See*: *Pender v Lushington* (1877) 6 Ch D 70; *Foss v Harbottle*). (*See also: 'Fairness and Good Faith as a precept in the Law of Corporations and other Business Organizations by Charles W Murdock — Vol 36 Loyola University Chicago Law Journal 551 [2004–2005]'*) ...

[65] Finally, in my utmost respectful view, sans a common understanding giving birth to a legitimate expectation, the exercise by the majority shareholders of their power under the articles to vote the plaintiff off the board, did not contravene any prior agreement between them and was not contrary to any equitable principle of good faith, as explained by Lord Hoffmann in *O'Neill v Phillips*. There is no permanent right to a directorship unless it is entrenched specifically in the memorandum and articles of association. An illustration of this is the case of *Re Chi Liung & Son Ltd; Tong Chong Fah v Tong Lee Hwa & Ors* [1968] 1 MLJ 97 where the founding director Chi Liung's position was ensconced as a permanent director until she resigns the office or dies. Under Singapore's s 216, the equivalent of our s 346 of the CA 2016, in the case of *Re Tri-circle Investment Pte Ltd* [1993] 2 SLR 523, Judith Prakash J held:

> the removal of the first and second petitioners as directors did not entitle them to relief under section 216. They did not have entrenched places on the board nor should they have expected to be able to remain on the board ...

[66] As such, this complaint must necessarily fall.

Plaintiff's alleged entitlement to RM270,000 as loan to the company

[67] This claim was predicated on assertions that by the contents of the letter dated 24 December 2008 (marked during trial as 'ID-P1' pending cross examination of Lee Senior), the plaintiff is entitled to a sum RM320,000 representing 2% of the sale price arising from a sale of Lee Senior's land known as Lot 90396 in 2011, of which according to the plaintiff, RM50,000 was used to pay his 10% shareholding in the company and the balance RM270,000 was converted to a director's 'loan' to the company. Parties were also invited to address the admissibility of this Letter in their written submissions. I find firstly, the plaintiff's assertion that RM50,000 out of this RM320,000 was used to pay for his 10% shares in the company is not borne out by the evidence. The company's ledgers at CBD4, pp 693–695 show Lee Senior paid for the plaintiff's shares. Secondly, his evidence in cross-examination put paid such assertion:

Cross-Examination of plaintiff (NOP p 72)

SSM: Ah. My instruction is that when you were given the 10% shares in Ning Yang, Mr Lee Senior paid it for you in return for you to help Ning Yang Company.

CHAN: Yes.

[68] The plaintiff during cross-examination was also asked of the events leading to the signing of the letter. In his evidence (pp 27–29 NOP), he could not recall: (i) when or where it was signed; (ii) when he counter-signed the acknowledgment; and (iii) who explained the contents of the letter to Lee Senior (who does not read or write English). He further confirmed in cross-examination that:

(a) save for the letter, there are no other documents to show his alleged involvement in procuring the relevant approvals for Lot 90396;

(b) the letter is not in the company's records nor was the alleged loan of RM270,000 recorded in the company's audited accounts;

(c) he did not in the last ten years issued any demand for this loan or made a request or bring the matter up in a board meeting 'Because all the while for the past 10 years, Ning Yang didn't make a profit. That's why I see the financial statement is not healthy, that's why I am not asking about this loan. That's it';

(d) his allegations of involvement on Lot 90396 do not concern his rights as shareholder of the company, simply because the company was not even in existence and the letter had nothing to do with the company:

Cross-Examination of plaintiff (NOP p 50):

SSM: Now just to be clear because your suit today is for minority, as a minority shareholder and you claimed that you have been oppressed, yes. That is your suit today. Now to be clear *this letter that you have produced dated 24 December 2008 has nothing to do with Ning Yang Company as the company was not even in existence in 2008.* Do you agree or disagree?

CHAN: *Agree.*

[69] Conversely, Lee Senior, inter alia, testified that:

(a) as early as 1997, he engaged various consultants, attended to the applications for all the necessary approvals from the relevant authorities in respect of Lot 90396; and

(b) he has never seen the letter until it was produced in the instant proceedings when he saw it for the first time; that he had not signed it, and he lodged a police report which was produced as a Part B document at CBOD 6, p 1323.

[70] Curiously, Lee Senior's evidence was not challenged at all during cross examination and as such deemed to be accepted. Neither was the plaintiff's case concerning this loan to the company put to the defendants. Having regard to the totality of the evidence before the court, I find that the plaintiff has not discharged the burden of proving an agreement between him and Lee Senior to be paid for his alleged involvement in Lot 90396 and that out of such entitlement, he has loaned a sum of RM270,000 to the company. As it is Lee Senior's unchallenged evidence that he did not sign the letter, I am of the view that 'ID-P1' cannot be admitted as evidence.

[71] Even if I am wrong on not admitting 'ID-P1' and marking it as an exhibit, if it is to be the foundation for the return of the alleged loan of RM270,000 to the company, it is my respectful view that the claim is hopelessly time barred. I also fail to see what nexus it has with his rights as a shareholder. 'There is authority for saying that even if the directors or majority shareholders have been guilty of improper or unreasonable conduct so that there appears to be a prima facie case for relief, it will be refused if the real purpose of the petitioners is to obtain payment of money owed by the Company' — *Re Senson Auto Supplies Sdn Bhd* [1988] 1 MLJ 326 at p 332, citing with approval *Re Bellador Silk Ltd* [1965] 1 All ER 667. Not only that. The loan also cannot be said to be made to the company when the company was not incorporated in 2008.

Unpaid director's salaries

[72] Although a ground of complaint, the plaintiff did not address this issue of non-payment of director's salaries in his submissions and appeared to have

abandoned this grievance. At any rate, it is to be noted that both Lee Senior and Lee Junior were also not paid for the periods claimed by the plaintiff. I fail to see any clear or convincing evidence on how such non-payment unfairly discriminates against him. As such, I find no merits in this complaint as the plaintiff's allegations of unpaid salaries as a director of the company do not affect him in his capacity as a shareholder, and in any case outside the ambit of s 346.

Non-payment of dividends

[73] As for this claim, I accept the defendants' assertions that due to tight cash flow, no dividends were paid. This non-payment of dividends was not discriminatory of or targeted specifically at the plaintiff as Lee Senior and Lee junior as the other shareholders, were also similarly not paid. The plaintiff was not treated any differently from the other shareholders on the non-payment of dividends. He was aware the company was not making profit. He maintained an elegant silence and in his own words, he even did not chase the company for his alleged loan of RM270,000 'Because all the while for the past 10 years, Ning Yang didn't make a profit. That's why I see the financial statement is not healthy, that's why I am not asking about this loan. That's it'.

[74] The plaintiff did not do himself a favour by conceding the company made no profits. Added to that, it is trite that it is within the discretion of the directors and an internal management decision whether to declare dividends or not. It is a general rule that the court has no jurisdiction to interfere with the internal management of companies so long as they are being managed in accordance with the law.

[75] The fact of the company not making profits as admitted by the plaintiff blows the plaintiff's claim for dividends to smithereens. At any rate, s 131(1) of the CA 2016 provides that dividend is to be paid out of the company's profits. Breach of s 131(1) by officers of the company is underscored by the criminal sanctions spelt out in s 131(2) attracting imprisonment not exceeding five years, a fine not exceeding RM3m or both. Not only that, s 133(1) proscribes that the company may recover the amount of distribution received by a shareholder which exceeds the amount which could properly have been made unless the shareholder: (1) has received the distribution in good faith; and (2) has no knowledge that the company did not satisfy the solvency test. Section 133(2) provides for the liability of the director and manager who wilfully paid or permitted to be paid dividends out of what they knew to be not profit. They are liable to the company to the extent of the amount exceeding the value of any distribution of dividends that could properly have been made. Suffice to say in the end, there is no merit in this complaint.

[76] In summary, on the evidence adduced and assessed, I find the precise nature of the plaintiff's complaints as borne out by the evidence adduced is unsatisfactory and do not engage the intervention of this court under s 346 of the CA 2016. Nay, inflict violence to its express language.

[77] Whilst I understand that the plaintiff cannot work together with the two Lees anymore, however, I can be forgiven if I venture to say that I view with scepticism the plaintiff's claim as he appears to have commenced his claim of oppression for the collateral purpose of being able to exit at will. The oral and documentary evidence when considered objectively points in reality to the plaintiff's claim of oppression as not being genuine. This is accentuated by his own evidence:

> Re-Examination of plaintiff (NOP p 161)
>
> RSS: Ok, that's fine. Now you were asked that in your prayer, in your claim, you have asked that the company, one of the prayers you have asked is that the company be wound up, ok? Now can you explain to the, to My Lady ... in this action?
>
> CHAN: Ok, My Lady, of course I don't want the company to be wound up. At the end there or maybe the, *my end objective here is to cash out. I don't want to involve in this company any more. I just want to maybe sell my share to the company, I don't want to bother anymore, because if I didn't take any action here, I'm worried at the end of the day, my share worth nothing. It's my own objective, I want to cash out only, My Lady.*

[78] A mere desire to exit the company at will, will not afford a remedy under s 346. There is no right to cash out or exit at will — *O'Neill v Phillips* per Lord Hoffmann at p 14. I agree with that proposition and it should be the case here.

[79] In *O'Neil v Phillips*, after considering the question whether Mr Phillips had acted 'unfairly' for the purposes of s 459, Lord Hoffmann in his speech, turned to a submission made by counsel for Mr O'Neill to the effect that it did not matter whether Mr Phillips had acted unfairly, since even if he had not done so, trust and confidence between Mr O'Neill and Mr Phillips had broken down, and in those circumstances it would be unfair to leave Mr O'Neill locked into the company as a minority shareholder. To that, Lord Hoffmann had this to say at p 14:

> *I do not think that there is any support in the authorities for such a stark right of unilateral withdrawal*. There are cases, such as *Re a company* (*No 006834 of 1988*), *ex p Kremer* [1989] BCLC 365, in which it has been said that if a breakdown in relations has caused the majority to remove a shareholder from participation in the management, it is usually a waste of time to try to investigate who caused the breakdown. Such breakdowns often occur (as in this case) without either side having done anything seriously wrong or unfair. It is not fair to the excluded member, who will usually have lost his employment, to keep his assets locked in the

company. But that does not mean that a member who has not been dismissed or excluded can demand that his shares be purchased simply because he feels that he has lost trust and confidence in the others. I rather doubt whether even in partnership law a dissolution would be granted on this ground in a case in which it was still possible under the articles for the business of the partnership to be continued. And as Lord Wilberforce observed in *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492; [1973] AC 360, one should not press the quasi-partnership analogy too far: 'A company, however small, however domestic, is a company and not a partnership or even a quasi-partnership'.

[80] For the reasons given, the plaintiff's claim is dismissed with costs.

[81] It remains for me to record my appreciation to learned counsel for the respective parties for their efforts expended in their submissions. I do not propose to burden this judgment by citing at length each of the arguments and authorities relied upon by learned counsel.

[82] I ought to state that I have found it necessary to discuss authorities not cited by either side both local and foreign but which I considered pertinent to the crux of the claim made and the contentions raised. This does not however in my view necessitate any further argument or detract from the basic propositions advanced and argued by both sides.

Claim dismissed with costs.

Reported by Nabilah Syahida Abdullah Salleh